No. 22092

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD R. CLEMENTS, Trustee in Bankruptcy of the Bankrupt Estates of STONE MOUNTAIN SNIDER, dba SNIDER FAMILY MARKETS, and RUBY E. SNIDER,

Appellant,

vs.

AUSTIN T. SNIDER and ANGELINE M. SNIDER, dba SNIDER FAMILY MARKETS,

Appellees.

On Appeal From the United States District Court for the Central District of California.

BRIEF FOR THE APPELLEES.

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BRIEF FOR THE APPELLEES.

Jurisdictional Statement.

The Appellant Trustee in Bankruptcy filed a Complaint in the United States District Court for the recovery of an alleged preferential transfer under the provisions of the Federal Bankruptcy Act [Clk. Tr. pp. 2-7].

This is an appeal from a summary judgment in favor of the defendants in that action made and entered on May 22, 1967, by the Honorable A. Andrew Hauk, United States District Judge [Clk. Tr. pp. 70-71].

The appeal is prosecuted in accordance with the provisions of Rule 73 of the Federal Rules of Civil Procedure.

The courts of appeal have jurisdiction of appeals from all final decisions of the district courts of the United States, except where a direct review may be had in the Supreme Court. United States Code, Title 28, Sec. 1291.

The judgment entered on the granting of defendants' motion for summary judgment is a "final judgment".

Poss v. Lieberman, 299 F. 2d 358 (2 CA 1962).

Statement of the Case.

The appellant does not contravert the findings of fact made by the trial court in determining the appellees' motion for summary judgment, but in his statement of the case and argument he fails to set forth certain of these facts accurately. To the extent that it may bear upon the legal conclusion to be drawn from these facts, appellees submit their own statement of the case.

On August 15, 1964, the appellees, Austin T. Snider and Angeline M. Snider, sold a meat market and retail grocery business, commonly known as the "Snider Family Market", to Stone M. Snider, brother of Austin, and to his wife, Ruby Snider [Clk. Tr. pp. 19, 20, 45, 46]. All of the documents evidencing this transaction were prepared by Harvey S. Krieger, attorney for Austin T. Snider [Clk. Tr. pp. 21, 46, 50]. These documents included a Notice of Intended Sale, a Notice of Intended Mortgage, an Agreement of Sale, an Installment Note, and a Mortgage of Chattels [Clk. Tr. pp. 23, 29, 31, 54, 55].

The total purchase price of the business was $41,-600.00, all of which was evidenced by the Installment Note secured by the Mortgage of Chattels on all of the fixtures, shelving, display cases, machinery and equipment of the business [Clk. Tr. pp. 24, 29, 31, 67].

The Notice of Intended Sale and the Notice of Intended Mortgage were, each and both, dated July 24, 1964, recorded on July 27, 1964, and published on July 29, 1964, stating that the sale would be made and the mortgage delivered on or after August 10, 1964 [Clk. Tr. pp. 54, 55, 56, 57, 67].

The Agreement of Sale, the Installment Note, and the Mortgage of Chattels were, each and all, dated and prepared for execution and acknowledgement on August 10, 1964, but not executed and acknowledged until five days later, August 15, 1964, when all of the parties were first able to be personally present at the same time [Clk. Tr. pp. 21, 23, 29, 31, 45, 46, 51, 52, 67].

On August 15, 1964, at 8:00 A.M. all of the parties were present in Mr. Krieger's office, and in his presence and capacity as a notary public, and in the presence of each other, without changing the date in any of the documents, the sellers and purchasers executed the agreement, and the purchasers executed the note and mortgage and acknowledged their execution of the mortgage. Mr. Krieger, acting as a notary public, then executed the certificate of acknowledgment endorsed on the mortgage by affixing his signature and seal thereto [Clk. Tr. pp. 21, 46, 51, 52, 67].

Thus the sale was in fact made and the mortgage delivered on Saturday, August 15, 1964 Clk. Tr. pp.

19, 20, 21, 46, 51]. The Mortgage of Chattels was recorded on the following Monday afternoon, August 17, 1964, at 3:20 P.M. [Clk. Tr. pp. 31, 67].

The purchasers, Stone M. Snider and Ruby Snider, first took possession of the meat market and grocery business, and the fixtures, shelving, display cases, machinery and equipment of said business after the execution of the agreement, note and mortgage on August 15, 1964, and solely and exclusively operated said business until December 25, 1965 [Clk. Tr. pp. 20, 21, 46, 47, 67].

That as of December 16, 1965, the purchasers were delinquent in principal payments due on the note in the approximate amount of $4,900.00 [Clk. Tr. pp. 21, 47]. At the request of the parties, Mr. Krieger then prepared an Agreement of Renunciation and Surrender which was dated, signed and acknowledged on December 23, 1965, and recorded on December 28, 1965 [Clk. Tr. pp. 21, 22, 39, 47, 52, 53, 67, 68]. This agreement provided for the renunciation and surrender of all of the right, title and interest of the mortgagors in and to the fixtures, shelving, display cases, machinery and equipment of said business, as described in the Mortgage of Chattels, with the exception of certain shelving, grocery gondola and adding machine which the mortgagors had disposed of, in consideration for the mortgagees fully and finally discharging, acquitting and releasing the mortgagors from any and all further liability under the note secured by the mortgage [Clk. Tr. pp. 39, 67].

On January 28, 1966, Stone Mountain Snider, doing business as Snider Family Markets, and Ruby E. Snider filed voluntary petitions in bankruptcy. The appellant

sued appellees for the recovery of an alleged preferential transfer in two causes of action. The first alleged that the mortgage was not timely recorded and thus invalid as to creditors, and the second that the mortgage was not properly acknowledged and hence also invalid as to creditors. In either event, appellant asserted that appellees were nothing more than general unsecured creditors and that the transfer to them within four months preceding the filing of the bankruptcy constituted a voidable preference [Clk. Tr. p. 2].

In opposition to appellees' motion for summary judgment, and the affidavits in support thereof, appellant raised no genuine issue as to any material fact and apparently abandoned for the purpose of the motion, as well as this appeal, any contention that the mortgage was not timely recorded (Appellant's Br. p. 4).

In his statement of the case, moreover, appellant concedes that if the mortgage was properly acknowledged, summary judgment was proper (Appellant's Br. p. 4).

The Question Involved.

The sole question raised by this appeal is whether an erroneous date alone in the certificate of acknowledgment is sufficient to invalidate an otherwise properly acknowledged mortgage of chattels.

Summary of Argument.

The trial court properly determined that the mortgage of chattels was properly acknowledged and validly recorded, and there being no genuine issue of fact, that the appellees wee entitled to summary judgment as a matter of law.

ARGUMENT.

POINT I.

An Erroneous Date in a Certificate of Acknowledgment Does Not Itself Invalidate an Otherwise Properly Acknowledged Mortgage of Chattels.

The sole point that is in contention in this appeal was also presented and argued to the trial court in the motion for summary judgment. In fact, the very same authorities, without elaboration or deletion, were submitted by appellant below in support of the contention that the mortgage of chattels was not properly acknowledged.

The appellees are constrained to closely parrot their same argument in refutation.

As this appeal is made to turn on the significance of an erroneous date in the certificate of acknowledgment, so the appellant again argues that this case "falls squarely" ["on all fours"—Clk. Tr. p. 61, line 4] under *Martin v. Crocker-Citizens National Bank,* 349 F. 2d 580 (9 C.A. 1965). This contention remains the basic disagreement between respective counsel. Appellant's argument ignores the historic and legal distinction between the act of acknowledgment and the certificate of acknowledgment.

In the *Martin* case the act of acknowledgment was the very issue in dispute. The line of authorities are consistent in insisting upon compliance with the act or fact of acknowledgment. They are equally consistent in determining that the omission, mistake, error

or falsity of the date in the certificate of acknowledgment will not itself invalidate the certificate.

> "An acknowledgment is the declaration before a competent court or officer, by a person by whom an instrument has been executed, that such execution is his act and deed".
>
> 1 California Jurisprudence 2d, Sec. 2, p. 460;
> *De Wolfskill v. Smith,* 5 Cal. App. 175, 184, 89 Pac. 1001 (1907).

> "The certificate of acknowledgment is not a part of the contract or other instrument to which it is attached, but is merely a mode of proof, or prima facie evidence of a fact".
>
> 1 California Jurisprudence, 2d, Sec. 2, p. 460.

The requisites for the act of acknowledgment only are set forth in Section 1185 of the California Civil Code. This section provides that the acknowledgment of an instrument must not be taken unless the officer taking it knows, or is furnished evidence, that the person making the acknowledgment is the person described in the instrument.

In reversing the District Court (*In re Aerocolor,* 236 F. Supp. 84 (S. D. Cal. 1964)) the Court of Appeals in Martin determined that the chattel mortgage was not acknowledged where the officers of the mortgagor signed the mortgage and deposited it with the mortgagees without acknowledging their signatures in the presence of the notary public who attached his certificate to the document. The court concluded that the necessary step prescribed for the act of acknowledgment by California Civil Code Section 1185 had not been satisfied and hence no lien was created in that

the officer taking it did not know or have satisfactory evidence that the person making such acknowledgment was the individual who was described in and who executed the instrument. The critical question was the act of acknowledgment itself. In order to determine the manner in which the officer "knows or has satisfactory evidence" that the person making such acknowledgment is the individual who is described in and who executed the instrument, the Court necessarily looked to the form of the certificate of acknowledgment. This reference, however, was not intended to destroy the basic distinction between the act of acknowledgment and the certificate of acknowledgment, nor to impress upon the certificate strictures not otherwise intended.

In the acknowledgment is properly made, and the certificate only is defective, the instrument is valid.

1 California Jurisprudence 2d, Sec. 15, p. 483.

The four California cases cited by the appellant on page 10 of his opening brief, *Kelsey v. Dunlap,* 7 Cal. 160 (1856), *Bryan v. Ramirez,* 8 Cal. 461 (1858), *Emeric v. Alvarado,* 90 Cal. 444, 27 Pac. 356 (1891), and *Rolando v. Everitt,* 72 Cal. App. 2d 629, 165 P. 2d 33 (1946), are all cases turning on requisites for the act of acknowledgment.

Thus, in *Kelsey,* there was no statement that the person making the acknowledgment was either personally known, or proved to the officer to be the person who executed the instrument.

In *Bryan,* there was no statement of the fact of acknowledgment by the person who executed the instrument.

In *Emeric,* the officer taking the acknowledgment was not a notary in the County where the acknowledgment purportedly took place. The material element again concerned the act of acknowledgment and the authority of the officer to take an acknowledgment.

Finally, in *Rolando,* the act of acknowledgment was that by an individual rather than by a partnership.

The only other California case cited by appellant, *Kahriman v. Jones,* 203 Cal. 254, 263 Pac. 537 (1928), involved neither the act of acknowledgment nor the certificate of acknowledgment, but rather the fatal effect of the absence on the face of a chattel mortgage of the due date of the debt secured thereby.

On the other hand, there are a number of uniform decisions throughout the United States on the non-fatal effect of an ommission, mistake, error or falsity in the date of an otherwise properly acknowledged certificate of acknowledgment.

> "It is the general practice to specify in a certificate of acknowledgment the date upon which the acknowledgment is taken, but if a certificate is sufficient in other particulars, the mere omission of the date or some part thereof from a certificate is not necessarily fatal".
>
> 1 American Jurisprudence 2d, Sec. 47, p. 478.

Three cases to this effect are *Dahlem's Estate,* 175 Pa. 454, 35 Atl. 807 (1896) (an ommission of the date in the certificate of acknowledgment of a mortgage did not invalidate the line of the mortgage, if the date of the acknowledgment appears from an inspection of the whole instrument); *Hasley v. Bunte,* 176 Okla. 457, 56 P. 2d 119 (1936) (undated certifi-

cate of acknowledgment did not vitiate deed); and *Barouh v. Israel,* 46 Wash. 2d 37, 281 P. 2d 238 (1955) (blank date in certificate of acknowledgment in declaration of homestead not a material defect).

> "If the certificate of acknowledgment is dated earlier than the instrument, but it is clearly shown that the date is errneous, that fact alone does not invalidate the certificate. In fact, if no date appears in the certificate, or if the date is rendered by evidence within the instrument itself so doubtful as to destroy its force, the certificate is presumed to have been made at the date of the instrument".
>
> 1 California Jurisprudence 2d, Sec. 29, p. 503.

Two cases to this effect are *Fisher v. Butcher,* 19 Ohio 406 (1850) (where it was held not error to admit a deed in evidence even though the certificate of acknowledgment bore a date prior to the time of making the deed when from the instrument it appeared that it was actually made at the time of its acknowledgment, and that the contradiction in date arose from a mere clerical error); and *Brown v. Title Ins. & Trust Co.,* 51 Cal. App. 65, 196 Pac. 114 (1921) (rehearing denied by Supreme Court) (where the date stated in the certificate of acknowledgment for a deed was obviously wrong on its face, the certificate was treated as undated and was presumed to have been made on the date of the execution of the deed).

> "The date of the certificate is not an essential part thereof, and its omission, or a mistake therein, will not of itself invalidate the certificate".
>
> 1 Corpus Juris Secundum, Sec. 85, p. 843.

The mere omission from the certificate of the date or a mistake in the date of the certificate does not ordinarily invalidate it.

25 American Law Reports 2d, p. 1141.

> "The date as stated in the certificate of acknowledgment is not regarded as a material fact as to which accuracy is required. Consequently a certificate otherwise sufficient will not be rendered void by the entire absence of a date or by mistake in the date, or although the date is intentionally false. . . . The true date of the acknowledgment in these cases may ordinarily be shown by parol".
>
> 1 Corpus Juris Secundum, Sec. 85, p. 843.

In the context of intentional falsity is *Tenney Co. v. Thomas,* 61 N.D. 202, 237 N.W. 710 (1931) (where a mortgage was executed October 8th, dated back to June 24th, and delivered on October 9th, it was still held superior to a mortgage executed and delivered on December 14th). The Court in *Tenney* held that the date was not an essential matter, that the identity of the mortgagor and the fact of his acknowledgment are the material facts.

> "Before a certificate of acknowledgment will be held fatally defective there must be an absence of some essential fact of a substantial character. (citation). We therefore hold that though the date of the certificate of acknowledgment was intentionally false, the mortgage was, nevertheless, properly filed".
>
> *Tenney, supra,* at p. 209.

Unlike the *Martin* case the mortgagors here personally acknowledged their execution in the presence of the notary, and in fact executed all of the documents in his presence. Unlike even the *Tenney* case there was no attempt by any of the parties to antedate any of the agreements in this contemporaneous, good faith transaction, for present consideration.

The appellant's charge that all parties, or any party other than the notary, knew that the date in the certificate of acknowledgment had not been changed from August 10, 1964, to August 15, 1964, is without factual support in the record or otherwise (Appellant's Br. p. 5).

The appellant's charge that the parties "deliberately participated with their (sic) agent, the notary, in executing a false certificate of acknowledgment" is incomprehensible and inexplicable.

There was no conspiracy, attempt, or intent, covert or overt, to antedate any of the documents, and no purpose to be served thereby even presuming such intent. Each and all of the documents were prepared for execution on August 10, 1964, and except for the simple but true fact that all of the parties were unable to meet together until five days later, they would have been signed and acknowledged on the earlier date. The published notices, moreover, specifically stated on or after August 10, 1964. And, finally, there was no delivery of title or possession of the mortgaged chattels until the date of actual execution.

Conclusion.

For the reasons herein stated, the summary judgment in favor of the appellees should be affirmed.

Dated: This 26th day of December, 1967.

Respectfully submitted,

HARVEY S. KRIEGER,
Attorney for Appellees.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HARVEY S. KRIEGER